BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUBEN PARGA[1]	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,042,364
FARMLAND FOODS, INC.	)	
Respondent	)	
	)	
AND	)	
	)	
ACE AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the January 25, 2012, Post-Medical Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board placed this appeal on its summary docket for disposition without oral argument. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and Jeffrey King of Salina, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board is the November 8, 2011, Post-Award Hearing transcript and exhibit thereto; the January 4, 2010, settlement hearing transcript and attachments thereto; the September 23, 2009, Regular Hearing transcript and exhibits

[1] The employee's name on claimant's Application for Hearing is Ruben Parga-Quintanar, and his name in the captions of some of the transcripts is Ruben Parga Quintanar and for other transcripts it is Ruben Parga. Claimant signed the Application for Post Award Medical as Ruben Parga, and the Post-Award Hearing transcript and the majority of the pleadings thereafter list claimant's name as Ruben Parga.

thereto; the October 27, 2009, Continuation of Regular Hearing transcript and exhibit thereto; the transcript of the June 17, 2009, discovery deposition of Ruben Parga Quintanar; the transcript of the September 25, 2009, deposition of Dr. Pedro A. Murati and exhibits thereto; the transcript of the October 6, 2009, deposition of Jerry Hardin and exhibits thereto; the transcript of the November 2, 2009, deposition of Dr. Paul Stein and exhibits thereto; the transcript of the November 2, 2009, deposition of Steve Benjamin and exhibits thereto; the transcript of the November 18, 2009, deposition of Mary Strouse; the transcript of the November 18, 2009, deposition of Robbin Eugene Trompeter; the transcript of the November 18, 2009, deposition of Trang Huynh and exhibits thereto; and all pleadings contained in the administrative file.[2]

ISSUES

On June 16, 2011, claimant filed an Application for Post Award Medical seeking "[m]edical treatment for back and knees."[3] Claimant was injured in a June 2007 accident while working for respondent and underwent a lumbosacral fusion. At the post-award hearing claimant indicated his symptoms of back pain had grown worse over the past several months. The primary medical treatment he was seeking was a prescription for pain medication. Claimant's counsel requested that Dr. Pat Do be appointed as the authorized treating physician for claimant.

Since claimant's post-accident surgery, he left respondent's employment and has worked at several manual labor jobs. Respondent contends that the tasks claimant performed at these jobs caused an aggravation of claimant's back condition. It asserts claimant's need for medical treatment is not the result of the injuries claimant suffered as a result of his June 2007 accident, but was from the intervening jobs he held.

Respondent asks the Board to reverse that portion of the ALJ's Post-Medical Award that states "[t]he claimant has met his burden to establish that his current need for medical treatment has resulted from an aggravation of his pre-existing condition and is a natural and probable consequence of the original work injury."[4] Respondent asks that if the Board affirms the ALJ's Post-Medical Award, that the Board affirm the appointment of Dr. Sandra Barrett as claimant's authorized treating physician. Claimant asks the Board to affirm the ALJ's Post-Medical Award in all respects. Neither party appealed the part of the ALJ's

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[2] In her Post-Medical Award, ALJ Barnes indicated that the record consisted of the transcript of the November 8, 2011, Post-Award Hearing; the exhibits offered into evidence by the parties and the pleadings and correspondence contained in the administrative file. However, at page 5 of the Post-Award Hearing transcript the parties agreed the ALJ would consider the testimony of claimant at the post-award hearing; the report of Dr. Stein, which is Respondent's Exhibit 1 thereto; and the prior record.

[3] Application for Post Award Medical (filed June 16, 2011).

[4] Post-Medical Award (Jan. 25, 2012) at 3.

Post-Medical Award that awarded claimant post-award attorney fees in the amount of $1,612.50. Therefore, the issue before the Board is:

Is claimant's current need for medical treatment the result of his original accident on June 12, 2007?

FINDINGS OF FACT

After reviewing the record and considering the parties' briefs, the Board finds and concludes:

While working for respondent, claimant suffered a series of repetitive injuries culminating on June 12, 2007. Claimant does not speak English and an interpreter was used at all hearings. On February 15, 2008, claimant underwent an L5-S1 decompressive laminectomy with bilateral medial facetectomy and foraminotomy, discectomy, and posterior lumbar interbody fusion and posterior instrumentation at L5-S1 with posterolateral fusion. After recovering from surgery, claimant returned to work for respondent, but was terminated in May or June of 2009.[5]

On January 4, 2010, claimant settled his claim for a lump sum. All issues were closed, except claimant retained the right to future medical treatment. Dr. Pedro A. Murati's records were attached to the settlement hearing transcript. The doctor gave claimant the following permanent restrictions: alternate sitting, standing and walking; no crawling; limit bending, crouching and stooping to rarely; limit sitting, standing, walking, climbing stairs, climbing ladders, squatting and driving to occasionally; no pushing and pulling more than 20 pounds; limit pushing and pulling to 20 pounds or less occasionally; and limit pushing and pulling to 10 pounds or less frequently. Dr. Paul S. Stein's records, which were also attached to the settlement hearing transcript, also contain permanent restrictions. He restricted claimant from lifting more than 50 pounds, avoid frequently repetitive bending and twisting of the lower back, and avoid frequent lifting from below knuckle height.

After the settlement hearing in January 2010, claimant went to work for Creekstone Farms (Creekstone) for approximately three and one-half months. There he would pack steaks into boxes while standing at a conveyor belt. While at Creekstone, claimant worked eight hours per day, five days per week. Claimant left this job primarily because of the distance he had to travel working that job.

Following his job at Creekstone, claimant went to work for Joy Construction (Joy). There he would move cinder blocks, mix concrete, carry sections of rebar and work on scaffolding. Claimant worked approximately two months for Joy. There he worked eight

[5] R.H. Trans. at 6.

hours per day, five days per week. He was terminated when he failed to show up at work on a Saturday.

Claimant next worked for BPW, another construction company. He performed the same tasks as he did at Joy Construction, but worked ten hours per day, seven days per week. He was discharged for improperly mixing concrete.

The last employer claimant worked for prior to the post-award hearing was Sinclair Construction (Sinclair). Claimant was laid off by Sinclair due to the weather, but anticipated returning to work once the weather cleared. While at Sinclair, claimant performed the same tasks he did at Joy and BPW. He worked eight hours per day, five days per week.

Claimant testified that he worked at all of these jobs without restrictions. The construction jobs required him to usually lift 25 pounds with 30 pounds being the heaviest weight lifted. Claimant indicated that he suffered no injuries at any of the companies he worked for after he was discharged by respondent. He stated that, "[b]ut when I am working and moving and moving bricks, I feel it [pain] more."[6] Claimant also testified that he has not suffered any injuries to his back "off the job."[7]

After his 2008 surgery, claimant testified that his pain got a little better, but was still there. Claimant's pain extended down his back into his right leg and foot. When he was working and moving bricks, he felt the pain more. He would also feel the pain when doing things outside of work. At the time of the post-award hearing, claimant had been off work from Sinclair for three weeks and his back still hurt. Since the settlement hearing on January 4, 2010, no doctor has been authorized to provide claimant with a prescription for pain medication. Claimant testified that since the settlement, he has not taken any non-prescription pain medicines.

At the request of respondent, on October 3, 2011, claimant was examined by Dr. Paul S. Stein, who is board certified in neurological surgery. A Spanish-speaking interpreter was present to interpret. The parties stipulated that the doctor's report of that examination be made part of the record without the necessity of Dr. Stein testifying. Claimant reported that his back hurt while working at Creekstone, but not as much as presently. However, his back pain increased over the time he worked the construction jobs, although there were no new or specific injuries. Dr. Stein's summary and conclusions were as follows:

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[6] P.A.H. Trans. at 10.

[7] *Id.*, at 9-10.

> Mr. Parga sustained injury to the lower back in June of 2007 at work for Farmland Foods and underwent a lumbosacral fusion. He has had no prescription pain medication since running out of his postoperative prescriptions and wants to have some pain medication available. The patient reports that his back pain has been increasing over the past five or six months. It is more likely than not that the increasing back pain is at least partly related to aggravation by his more recent work activity. Given that his back surgery was done in February of 2008 and that he was seen by myself in July of 2009, two years ago, the increase in symptomatology is more likely related to his current activities than to the original injury. The current need for medication, which he had not requested over those two years, is more related to his current activities than the original injury.[8]

The ALJ concluded that claimant met his burden of proof that his current need for medical treatment resulted from an aggravation of his pre-existing condition and is a natural and probable consequence of his original work injury. The ALJ then appointed Dr. Sandra Barrett as claimant's authorized treating physician and awarded claimant $1,612.50 for post-award attorney fees.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[9]

K.S.A. 2006 Supp. 44-510k(a) states:

> (a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and

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[8] *Id.*, Resp. Ex. 1 at 2-3.

[9] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

> amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

In their submission letters to the ALJ and in their briefs to this Board the parties cited *Montgomery*.[10] Montgomery sustained a back injury in 1994 and underwent back surgery. He returned to work for Volume Shoe in an accommodated position. Beginning in 2009, Montgomery began having an increase of back pain, which he attributed to work activities. Montgomery filed an application for post-award medical and a new claim alleging a series of repetitive injuries. The ALJ found, and the majority of the Board affirmed, that claimant's present need for medical treatment was a natural and probable consequence of his original injury sustained while working for Volume Shoe. The majority of the Board in *Montgomery* provided the following analysis:

> In *Jackson* [*v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972)], the Court held:
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> > When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).
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> But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman* [*v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973)], the Court attempted to clarify the rule:
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> > The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.
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> In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while

[10] *Montgomery v. Volume Shoe Corporation and Payless Shoesource*, Nos. 198,352 & 1,048,384, 2010 WL 4009108 (Kan. WCAB Sept. 15, 2010).

moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Logsdon*,[11] the Kansas Court of Appeals stated:

> Since *Jackson* and *Stockman*, our courts have struggled to understand and consistently apply the rule. The more straightforward situations are those where a primary injury *itself* causes subsequent further injury to the same or other body parts; in these cases there is usually no "intervening" trauma or accident and the subsequent claim is allowed. See, *e.g., Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977); *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976). These cases should not be confused with the tougher cases, where some intervening accident or trauma has aggravated a prior injury; as noted by the Board here, these cases make it "difficult to discern . . . consistent criteria."
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> Although not intended to be exhaustive, the following reported cases have allowed compensability for a subsequent injury that is a "direct and natural consequence" of a primary injury, despite an intervening accident or trauma: *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353[, 995 P.2d 855 (2000)] (claimant's subsequent injury was aggravation of an old preexisting back injury while participating in medical treatment programs for a compensable injury to his right forearm and shoulder); *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990) (where court "expanded" the rule holding that any additional injury arising from medical malpractice in the treatment of the primary injury is compensable); *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977) (2 years after initial injury to knee, claimant stepped from tractor and knee locked up).
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> In contrast, the following reported cases have denied compensability for a subsequent injury on the ground that it resulted from a new and separate accident: *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188[, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991)] (where original injury was broken knee, and knee "gave way" while lifting heavy crate 30 days after return to work; denied despite evidence knee tended to "give way" and treating physician had warned could " give way" in the future); *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, Syl., 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982) (after original back injury had healed and been fused, claimant slipped and broke part of the fusion during his fall; court said "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back").

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[11] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 83-84,128 P.3d 430 (2006).

ANALYSIS AND CONCLUSION

In *Logsdon*, the Kansas Court of Appeals stated that whether an injury is a natural and probable result of a previous injury is generally a fact question. The Court in *Logsdon* indicated there are cases in which (1) the original injury caused further injury and in those cases there was usually not an intervening accident or trauma; (2) there is a subsequent injury that is a direct and natural consequence of the primary injury despite an intervening accident or trauma, and (3) compensability for a subsequent injury has been denied on the ground it resulted from a new or separate injury. In the present claim, claimant is not alleging that he suffered a subsequent injury that is a direct and natural consequence of his original injury. In fact, he denies suffering any new injury or aggravation of his original injury. Instead, claimant alleges his need for prescription medication results from his original injury.

Claimant testified that following his 2008 surgery his pain got a little better, but he was never free of pain. In the months preceding the post-award hearing, his pain gradually worsened. Once his prescription pain medications ran out, claimant took no prescription pain medications. Claimant has not taken any non-prescription pain medication nor sought any medical treatment for his back since the settlement in January 2010. Dr. Stein found this fact significant when he said, "The current need for medication, which he had not requested over those two years, is more related to his current activities than the original injury."[12]

The jobs claimant has held since his January 2010 settlement have involved a great deal of labor. Dr. Murati's restrictions limited claimant to occasional standing and walking. Yet claimant's jobs at Creekstone and the three construction companies he worked for required him to stand and walk significantly more than occasionally. Claimant's job at Joy Construction, which required him to move cinder blocks and carry rebar, likely exceeded Dr. Stein's restrictions of avoiding frequently repetitive bending and twisting of the lower back. Claimant testified that, in particular, working, including moving bricks, caused him to have an increase in pain.

Respondent presented the only medical evidence at the post-award hearing, which was the October 3, 2011, report of Dr. Stein. In that report, Dr. Stein stated, "It is more likely than not that the increasing back pain is at least partly related to aggravation by his more recent work activity."[13] His report supports respondent's position that claimant's need for medication is related to his work activities since January 2010, not to claimant's original injury. The Board reverses the ALJ and finds that claimant has failed to prove by a preponderance of the evidence that his current need for medical treatment is the direct and

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[12] P.A.H. Trans., Resp. Ex. 1 at 3.

[13] *Id.*, at 2-3.

natural consequence of his original injury on June 12, 2007. Because neither party appealed the ALJ's award of post-award attorney fees, the Board affirms that part of the Post-Medical Award. Should counsel for claimant desire an additional fee for time spent on this appeal, he should present that request to the ALJ.

WHEREFORE, the Board reverses that part of the January 25, 2012, Post-Medical Award entered by ALJ Nelsonna Potts Barnes which found claimant's current need for medical treatment was the result of his original injury on June 12, 2007, and which appointed Dr. Sandra Barrett as claimant's authorized treating physician, but affirms the ALJ's award to claimant of $1,612.50 in post-award attorney fees.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge